FILE COPY

Office-Supreme Court, U. S.
FILED
AUG 6 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 226

MARY ELLYSON DOWDY, NANNIE ELLYSON POLLARD, and HATTIE ELLYSON MADDOX,

Petitioners,

v.

CLAYTON HAWFIELD, Individually, and as Executor of the Will of Mary Elizabeth Ellyson, Deceased; FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, Individually, and as Legatees Named in the Will of Mary Elizabeth Ellyson, Deceased; et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

LUTHER ROBINSON MADDOX,
Attorney for Petitioners.

MARIE FLYNN MADDOX,
Of Counsel.

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

In The

Supreme Court of the United States

October Term, 1951

No. .....

Mary Ellyson Dowdy, Nannie Ellyson Pollard, and Hattie Ellyson Maddox,

Petitioners,

v.

Clayton Hawfield, Individually, and as Executor of the Will of Mary Elizabeth Ellyson, Deceased; Frances Gertrude Scott, Florence O. Metz, Individually, and as Legatees Named in the Will of Mary Elizabeth Ellyson, Deceased; et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Your petitioners, by and through their attorney, Luther Robinson Maddox, respectfully pray that a writ of certiorari issue from this Court to the United States Court of Appeals, District of Columbia Circuit (hereinafter called "the Circuit Court"), in order that this Court may review the Circuit Court's decision and judgments entered March 1, 1951 (R. 117-120), which affirmed

two final orders and judgments of the United States District Court for the District of Columbia (hereinafter called "the District Court") in two appealed cases that had been consolidated (R. 116) in the Circuit Court. A petition for reconsideration and a rehearing *in banc* of the Circuit Court's decision and judgments in the respective cases (R. 121-132) was duly filed by your petitioners, and was denied on July 6, 1951 (R. 133) by a majority vote of all the Judges of that court.

STATEMENT OF MATTERS INVOLVED

The first of the consolidated cases (No. 10,475 (R. 1-49) of the Circuit Court) was an appeal from a final order and judgment of the District Court entered July 30, 1949 (R. 27, 28), which denied a motion of Petitioners, three heirs at law and next of kin of Mary Elizabeth Ellyson, deceased (hereinafter called "the testatrix"), made under Rule 24, FRCP, and filed July 14, 1949 (R. 11-23), to be allowed to intervene in a proceeding entitled "Exceptions to First and Final Account of Executor" (R. 9, 10) which had been filed in the probate division of that court in the matter of the estate of the testatrix (Adm. No. 67,046) by three legatees (respondents herein) named in the probated will of the testatrix; the motion also asking that further proceedings in the matter and the distribution of the estate be stayed until final determination of the independent civil action previously filed by Petitioners in the District Court against the parties to the Exceptions proceeding and others. Petitioners' complaint in the independent action was made part of the motion as the basis thereof. The order of July 30, 1949, denying Petitioners' motion to intervene and stay proceedings also denied the exceptions to the executor's account. In this connection, the following dates are very significant: On *July 26, 1949*, the Probate Court approved the account to which the exceptions had

been filed (R. 26); on *July 30, 1949,* as above stated, the Court denied the motion to intervene, etc., and denied the exceptions to that account; and on *September 17, 1949* (R. 41), the Court denied Petitioners' motion for reconsideration, etc. (R. 28-36), filed August 9, 1949, of the order of July 30th. It will thus be seen that the Court approved the executor's account before passing upon any of the motions affecting it. The appeal to the Circuit Court in this case was prosecuted by Petitioners against Clayton Hawfield, the executor, who was also made a defendant in the independent action.

The second of the consolidated cases (No. 10,724 (R. 50-115) of the Circuit Court) was an appeal from a final order and judgment of the District Court entered April 19, 1950 (R. 96), which, on motion of the defendant-respondents herein (who had filed no answer), summarily dismissed Petitioners' second amended complaint (R. 66-90, 96, 98) in the independent action (Civil Action No. 2791-49). The Court filed no opinion and made no findings in connection with the order of dismissal, although requested by Petitioners to do so (R. 99); the only indication of his reasons for dismissing the complaint being his pronouncement from the bench when the motion was argued (R. 116), that he failed "to find anything in the proceedings and in the pleadings that would take this action out of the prohibitive provisions of Rule 60(b) of Civil Procedure."

The independent action was instituted by Plaintiff-Petitioners against the executor and the other former caveatees to a caveat attacking the testatrix's will (tried in said administration proceedings), *and against three other defendants* (also respondents herein) who testified in the caveat trial as attesting witnesses to the will, namely: Mary Blanche Hawfield, wife of Clayton Hawfield, executor-respondent; Stella Adele McCombs, close friend of the attorney who drew the testatrix's will and who has

represented the caveatee-respondents in all proceedings in these matters other than the Exceptions proceeding; and Mattie L. Edwards, special nurse for the testatrix for a period of little more than a month. Petitioners and others were caveators in the will contest, and the decree therein was entered March 4, 1947, upon the verdict of a jury in favor of the caveatees.

The dismissed second amended complaint asked, *as an alternative to setting the decree in the caveat proceeding aside*, for equitable relief from that decree and for damages as legal relief. *Upon the basis of new and material facts* discovered by Petitioners, *with due diligence* (as shown by allegations of the dismissed complaint and by attached affidavits made part thereof (R. 67; 78-90)), too late to apply by motion for a new trial within the year prescribed by Rule 60(b)(2)(6), even if such a motion would have been an adequate remedy, or to proceed by independent action earlier than the date of its filing (June 28, 1949, a day after the close of the October, 1948, term of this Court in which it denied a writ of certiorari in the will case—Case No. 450 of that term), *and also upon the basis of evidence excluded by the trial judge in the will case as res inter alios acta to the issues tried therein* (R. 69, 70, 72, 73),—mental incompetency of, and fraud and undue influence exercised upon, *the testatrix*—the dismissed second amended complaint charges: That the decree in the will case was procured (and affirmed by the Circuit Court—Case No. 9625 of that court) through fraud perpetrated *upon the courts and also upon Petitioners and other heirs at law and next of kin of the testatrix.* Part of the excluded evidence above mentioned was a power of attorney purporting to have been signed by the testatrix, but charged in the dismissed complaint to have been forged. The dismissed complaint further charges that the procurement of the decree and of its affirmation *were steps*, among

others therein set out, in the consummation and effectuation of an unlawful, fraudulent conspiracy and collusion entered into between the respondents and others to injure Petitioners and other heirs at law and next of kin of the testatrix in their property rights in her estate, to obtain for the legatee-respondents possession of her estate, and to exclude from sharing therein Petitioners and others of her heirs at law and next of kin. The dismissed complaint also alleges that the newly-discovered material facts tend to prove that the defendant-respondents made materially false statements in their testimony in the will case; concealed and suppressed material evidence; and supported their case *solely by their own testimony* when many distinterested witnesses (*among them the very important witness newly discovered by Petitioners*) were available to them. It is deemed by Petitioners highly significant, too, that, as the dismissed complaint shows (R. 69), even the issue of *fraud upon the testatrix*, (as distinguished from the *fraud upon the courts and upon Petitioners* charged in the dismissed complaint) was not passed upon by the jury in the will case; the trial judge having separated the issues of fraud and undue influence, and permitted the latter to go to the jury but directed a verdict on the issue of fraud.

Petitioners' first amended complaint (R. 51-58) was voluntarily filed, under Rule 15(a), FRCP, and set up what they considered the requisite ultimate facts; but it was dismissed by Judge Matthews on March 3, 1950, with leave to amend (R. 65). It will be seen that the second amended complaint states the facts in considerable detail and incorporates the attached supporting affidavits above referred to. The prayers ask, in addition to other incidental equitable relief, that the Court pass an order *either* setting aside the caveat decree OR enjoining the legatee-defendants from carrying out and enjoying the benefits thereof, and declaring that the testatrix died

intestate. The prayers also ask judgment for compensatory and consequential damages, punitive damages, reasonable attorney's fee, and costs; and conclude with the usual general prayer for other and further relief (R. 75-77).

On their appeals to the Circuit Court, Petitioners assigned, among others, and argued, the following points:

In Case No. 10,475: That the denial by the District Court of Petitioners' right to intervene was error; that the Court abused its discretion in denying the motion; that findings of fact should have been made by the Court, showing the bases for the judgment and order denying the motion to intervene, etc., and denying the exceptions to the executor's account; that the first and final account of the executor should not have been approved and passed before the order denying the motion to intervene, etc., and the exceptions, had been signed and entered, nor even before Petitioners' motion to reconsider, etc., that order had been finally decided and determined.

In Case No. 10,724: That the District Court erred in dismissing Petitioners' second amended complaint, and in holding that the proceedings and pleadings in the independent action did not take it out of the prohibitive provisions of Rule 60(b), FRCP; that the probate decree of March 4, 1947, was lacking in finality, still hanging in suspense, and of no legal effect (R. 98, 101, 104); that Rule 60(b), FRCP, contemplates that there shall be no distinction made between *extrinsic* and *intrinsic* fraud, as to either motions *or independent actions*, as grounds for *granting relief from a judgment, order or proceeding*, and that, moreover, Petitioners' second amended complaint set up *extrinsic* fraud.

The decision of the Circuit Court, affirming the judgments of the District Court in both appealed cases, held (R. 117-120):

As to Case No. 10,475 (R. 1-49): That Petitioners had no such interest in the subject-matter of the Exceptions proceeding as would entitle them to intervene as a matter of right under Rule 24(a)(3), FRCP (citing *Pure Oil Co.* v. *Ross* (CA-7, 1948), 170 F. 2d 651); that Petitioners' interest in the testatrix's estate was determined to be nothing in "the former contest of the issues *which are also presented in this case*" (thus indicating the Circuit Court's view that the issues raised by Petitioners' independent action were rendered *res judicata* by the decree in the will case, notwithstanding that there was not the necessary identity of parties, issues, etc., in the two cases. See *Iselin* v. *Hunter Co.*, 173 F. 2d 388; also, Barron & Holtzoff, Fed. Pr. & Proc., Rules ed. (Comments on Rule 54), Sec. 1192, p. 7); and that Petitioners had no claim or defense in common with the main action which would entitle them to permissive intervention under Subsection (b)(2) of Rule 24, and no claim at all unless they succeeded in impeaching the caveat decree through their independent action.

As to Case No. 10,724 (R. 50-115): The opinion states that Petitioners could not have filed a motion to vacate the will-case decree because it would have been "barred by the one-year limitation in Rule 60(b)" (disregarding the "other-reason" clause of Rule 60(b)); and that, although the latter part of the rule "stipulates that, 'this rule does not limit the power of a court to entertain an independent action . . . *to set aside a judgment for fraud upon the court,*' the fraud must be extrinsic or collateral to the matter tried by the first court" (citing *U. S.* v. *Throckmorton* (1878), 98 U. S. 61, and *Josserand* v. *Taylor (1946)*, 159 F. 2d 249). It is surprising to note that in quoting from amended Rule 60(b) as to independent actions, the opinion omits the portion thereof referring to "an independent action *to relieve a party from a judgment, order or proceeding;*" apparently regarding

that clause as surplusage. The opinion states further that there can be no doubt that the alleged fraud "is of a purely intrinsic nature," and, consequently, "the appellants second amended complaint was properly dismissed." (R. 118)

Circuit Judges Clark and Miller were two of the three judges who heard the appeals in both the caveat case and the cases at bar; and, for the reason that they had affirmed the caveat decree, counsel for Petitioners, when the instant cases came on for oral argument, asked that they disqualify themselves from sitting thereon, but they declined to do so. Judge Clark wrote the opinions on the three appeals (R. 117, 125, 126).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936), 28 U. S. C. A., Section 1254; and Rule 38 of this Court.

QUESTIONS PRESENTED

I. Does not Petitioners' second amended complaint (R. 66-90) sufficiently allege a fraudulent conspiracy against the courts and Petitioners, uncovered with due diligence by Petitioners, and resulting, without fault or negligence on Petitioners' part, in unconscionable wrong to them, to warrant a trial of the case on the merits to bring out the truth or falsity of such allegations?

II. Did not the Circuit Court err in finding that Petitioners' second amended complaint set up only intrinsic fraud?

III. (a) Does this Court now consider that the nebulous distinction between intrinsic and extrinsic fraud,

sometimes in the past emphasized in Federal Court decisions, should be the dominating factor in deciding a case such as is set up in Petitioners' second amended complaint, in view of the obviously primary intent of the current Federal Rules of Civil Procedure to avoid technicalities in order to effect justice, and particularly in view of the liberal provisions of Rule 60(b), as amended, and as interpreted by this Court in late decisions? (b) If so, does not Petitioners' second amended complaint show extrinsic fraud, and to a degree sufficient to warrant a trial on the merits?

IV. Did not the Circuit Court err in failing to find that the District Court erred in dismissing the second amended complaint (R. 96, 117-120)?

V. Did not the Circuit Court err in finding that the allegations as to fraudulent conspiracy and collusion against the courts and Petitioners charged in the dismissed complaint raised the same issues as were determined by the probate decree of March 4, 1947, affirmed by the Circuit Court in 1948 (R. 117, 118) (and hence, the decision clearly implies, *res judicata*)?

VI. Under the allegations of Petitioners' second amended complaint, showing fraudulent conspiracy and collusion (and proffering proof thereof), due diligence in its discovery, and resultant unconscionable wrong to Petitioners, should not *Marshall* v. *Holmes,* 141 U. S. 589, rather than *U. S.* v. *Throckmorton,* 98 U. S. 61 (cited as authority for the Circuit Court's decision on Case No. 10,724) govern Petitioners' independent action, since both cases were based on intrinsic fraud and arrived at opposite conclusions on equitable grounds?

VII. Is not the Circuit Court's ruling in Case No. 10,724 in conflict with the principles enunciated in the Federal cases cited in *Hadden* v. *Rumsey Products, Inc.* (1951), 15 Fed. Rules Serv. 60b.25, Case 1?

VIII. Is not the decision of this Circuit Court in Case No. 10,724 in conflict with decisions of other Circuit Courts on the points involved, as well as with applicable decisions of this Court?

IX. Did not the Circuit Court, in its opinion and decision of March 1, 1951, on Case No. 10,724, ignore the principles laid down in *Marshall* v. *Holmes*, supra, and fail to give proper effect to those laid down in the *Hazel-Atlas* case, 322 U. S. 238 (R. 118)?

X. Did not the Circuit Court err: (a) in affirming the District Court's judgment in Case No. 10,475; (b) also in affirming the District Court's judgment in Case No. 10,724?

XI. (a) Did not the Circuit Court err in basing its ruling in Case No. 10,475 as to Section (a)(3) of Rule 24, FRCP (R. 118), on the *Pure Oil Co.* case, supra, when that case construed the rule as it stood prior to its amendment; and (b) did not Petitioners' complaint in the independent action, made the basis of their motion to intervene and stay proceedings in the probate matter, show that, if they prevailed in the independent action, they would be "adversely affected" by the prior distribution of the testatrix's property, then "subject to the control" of the Probate Court?

XII. Did not the Circuit Court err in holding, as to Case No. 10,475 (R. 118), that there was no question of law or fact common to the probate proceeding in which Petitioners sought to intervene and their independent action in Case No. 10,724?

XIII. Did not the Circuit Court deny Petitioners due process of law when it affirmed the District Court's summary judgment in Case No. 10,724 and thus denied them a trial on the merits of the allegations set up in their dismissed complaint?

XIV. Is it not the express intent of amended Rule 60(b), in stating that, in place of the former common-law writs and bills for obtaining relief from judgments, orders or proceedings, only motions or independent actions may now be resorted to for *any* such relief, that, under proper circumstances, an independent action may be filed, instead of a motion in the original case, and that, for *any such relief*, motions and independent actions shall be alternate remedies?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

1. The questions decided by the Circuit Court in its decision of March 1, 1951, on Cases Nos. 10,475 and 10,724 of that court have not been, but should be, settled by this Court, since they are of great general importance to litigants and lawyers in connection with Rules 24 and 60(b), FRCP; particularly Rule 60(b), as to the grounds on which independent actions for relief from judgments, orders or proceedings, may be maintained in view of the abolition, by that rule, of common-law writs and bills for such relief.

2. As to Case No. 10,475, calling for the construction of Rule 24, FRCP, the only case cited by the Circuit Court in its opinion (R. 118) was the *Pure Oil Co.* case, supra; but that case construes the rule as it stood before it was amended, and, moreover, it is submitted, the case has been misinterpreted by the Circuit Court. The complaint in Petitioners' independent action, made the basis for their motion to intervene in the Exceptions proceeding and stay further administration proceedings in the probate case, asserts a claim against the estate and the executor-defendant, and hence it was, and is, Petitioners' view that, under the rule, they were entitled to intervene and have the probate proceedings stayed until the

independent action might be finally determined and settled. For the distribution of the property of the testatrix was subject to the control of the Probate Court (R. 23-36), and, under the charges of fraudulent conspiracy and collusion made in the complaint, and its prayers for equitable relief against the decree in the probate case, there were questions of both law and fact common to the two cases.

3. As to Case No. 10,724, calling for an interpretation of amended Rule 60(b), FRCP, in connection with independent actions for relief from judgments, orders or proceedings: The Circuit Court in its opinion (R. 118) adopted the view of the appellee-respondents that, under the rule, the only ground upon which such an action may be brought is fraud upon the Court, and the only relief grantable is the setting aside of the judgment assailed. And the portion of the rule quoted by the Circuit Court, *with an important part deleted*, might be considered to support this view. But this section of the rule is in *three independent clauses* (and so set out by text-writers, such as Prof. Moore and Barron & Holtzoff), all but one of which was omitted from the quotation; and it is upon the first clause of the pertinent portion of the rule that Petitioners rely most strongly. Their dismissed complaint charges *fraud upon them and others* as well as upon the courts (and, indeed, it may be asked: Is not fraud upon the court in most cases also fraud upon the defeated party?), and it asks, as an alternative to setting the probate decree aside, for *equitable relief therefrom.* It seems obvious that each of the three clauses comprised in the relevant part of the rule was intended to stand alone—that they do not all lead up to *fraud upon the Court.* They are in the disjunctive. And both Moore, in his 1950 cumulative supplement to his Federal Practice and Procedure (Vol. 3, pp. 330, 331), and Barron & Holtzoff, on the same subject (Rules ed., Vol. 3, Sec. 1321, p. 250), commenting upon amended Rule 60(b),

divide that portion of the rule in question into numbered parts, thus: "(1) This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order or proceeding, *or* (2) to grant relief to a defendant, . . ., *or* (3) to set aside a judgment for fraud upon the court."

4. It is Petitioners' view, also, that the independent clauses must be read in conjunction with the last sentence of the rule, stating that writs of coram nobis, etc., are abolished, and that "the procedure for obtaining *any* relief from a judgment shall be by motion as prescribed in these rules *or* by an independent action." This final sentence strongly shows the intent of the rule that, in the place of the abolished writs and bills, *and under proper circumstances,* an independent action may be maintained for *any relief* for which the rule prescribes the grounds for motions. The Circuit Court, however (and the District Court, in so far as the view of the Motions Judge may be gleaned from his pronouncement on the bench (R. 115)), held that an independent action under Rule 60(b) may be maintained *only for the purpose of setting aside a judgment for fraud upon the Court.* The question thus raised by Petitioners on this point, and by the Circuit Court's opinion and decision thereon, *has never been settled by this Honorable Court;* and Petitioners submit that it is of such great importance to litigants and lawyers in the Federal courts that this Court should settle it.

II

1. The ruling of the Circuit Court, based upon *U. S.* v. *Throckmorton,* and what the opinion states is the affirmation of that rule in the *Hazel-Atlas* case of this Court as construed by *Josserand* v. *Taylor,* 159 F. 2d 249, that an action such as the one at bar cannot be maintained unless *extrinsic* fraud be shown, deals with another transcendently important question which, ever

since the decision in *Marshall* v. *Holmes* was handed down, has caused confusion and conflicting decisions in the lower Federal courts; a conflict which, Petitioners submit, has not been settled by the *Hazel-Atlas* case or any Federal case on the question; and which, Petitioners respectfully urge, this Honorable Court *should now settle*, in the light of the patent liberal intent of the current Federal Rules of Civil Procedure that technicalities be disregarded in the interest of effecting justice. The *Josserand* case was decided before Rule 60(b) was amended; and it is submitted, moreover, that the *Hazel-Atlas* case is in line with *Marshall* v. *Holmes*.

2. There can be no question that the whole tenor of the new rules proclaims the intent that equitable rather than strictly legal principles shall now prevail in all forms of actions. Down through the ages in equity cases technical legal rules have been circumvented in the interest of meting out justice; *and neither the Throckmorton case nor the Marshall case is an exception in this respect.* Without doubt the alleged spurious documents on which each case was based constituted *intrinsic* fraud in the one case as much as in the other; but the *Throckmorton* case denied relief (not solely on that ground), while the *Marshall* case granted it. *Why?* While it is true that the *Throckmorton* case went extensively into the matter of the necessity for showing *extrinsic* fraud, although conceding there were exceptions to the rule (*and on this point was actually cited in the Marshall case*), a careful reading and analysis of the *Throckmorton* case discloses that the denial of relief was based mainly on other factors, among them laches and the failure of the petition to show how the alleged fraud was uncovered and how it was to be proved. The *Marshall* case, on the other hand, does not characterize the fraud involved as either *intrinsic* or *extrinsic*, thus implicitly holding the nebulous distinction not to be the controlling factor in such cases, but bases its decision that Mrs. Marshall

should be allowed the opportunity to prove the allegations of her complaint upon the equitable grounds that she could not have anticipated that the letter alleged to have been forged would be brought into evidence at the trial against her, and so could not have been prepared at the time to prove its spuriousness; that she had thereafter used due diligence in uncovering the fraud and bringing her action to set the judgments assailed aside; and that, therefore, the Federal court should hear her case, and "determine whether, under the allegations and proof, a case was made which, *according to the established principles of equity,* entitled" her "to protection against the judgments alleged to have been fraudulently obtained."

3. Thus, regardless of whether or not the *Marshall* case overrules the *Throckmorton* case as to *intrinsic* and *extrinsic* fraud, it clearly appears that it is the *Marshall* case which should govern the decision in Petitioners' case. Their dismissed complaint shows due diligence in uncovering and bringing suit on the fraudulent conspiracy charged; the method by which the fraud was uncovered and the means of proving it are shown; and there is also shown that the newly-discovered evidence was not, and could not have been, known to them at the time the probate case was tried, and that certain evidence excluded in the caveat trial would be relevant to their independent action; and that, therefore, it would be unconscionable injustice to deny them equitable relief from the decree rendered in the caveat proceeding.

4. The Circuit Court holds, in effect, that Petitioners should have produced the main newly-discovered witness at the trial, notwithstanding that, as the dismissed complaint shows, they had, before the trial, exhausted every means available to them of ascertaining her whereabouts. Moreover, since this witness had been brought into the testatrix's home by the principal caveatee (R.

82, 83) and was known to be thoroughly familiar with the testatrix's condition at the time her purported will was executed, and who should, *if the caveatees' testimony was true,* have been their most valuable witness, Petitioners had every reason to expect, *and did expect until the caveatees had rested their case,* that they would produce her on their behalf, and Petitioners were taken completely by surprise by their failure to do so. If, at that time, Petitioners had been able to elicit from any of the caveatees information as to her whereabouts (which, under the circumstances, is extremely doubtful), it would have been folly for them, in the event they could have obtained an adjournment of the case, to have attempted to bring in this witness without knowing the nature of the testimony she could give. The record of the will case, moreover, most strongly indicates (No. 450 of the 1948 October Term of this court) that the trial judge would have refused an adjournment for such purpose.

5. The decision of the Circuit Court in this case No. 10,724 is in conflict not only with the *Marshall* case, but with the cases of (R. 123) *Publicker* v. *Shallcross,* 106 F. 2d 949, 126 A. L. R. 386; *Griffith* v. *Bank of N. Y.,* 147 F. 2d 899 (cited with approval in the Hazel-Atlas case); *Chicago, etc., Ry. Co.* v. *Calicotte,* 267 Fed. 799, (in which the theory in many respects paralleled that of the instant case, and the appellate court characterized as *extrinsic* fraud what might equally well have been called *intrinsic* fraud, in order to render justice); and other Federal Court cases of modern vintage which decry the practice of drawing a dividing line between *extrinsic* and *intrinsic* fraud when justice would be thereby thwarted (R. 100, 101) It is considered also that this Circuit Court's ruling is in conflict with the principles laid down in *U. S.* v. *Backofen,* 176 F. 2d 263, and the *Klapprott* case, 335 U. S. 601, 336 U. S. 952. *It is, therefore, most important that this court of last resort at this time*

dissipate the great confusion and settle the conflict on this question by rendering a definitive decision thereon.

6. The case of *Wooldridge Mfg. Co.* v. *LaTourneau* (D. C. Cal. 1948), 79 F. Supp. 908, shows that even California (which long held out for *extrinsic* fraud) is now following the modern trend toward disregarding the distinction between the two types of fraud where the equities warrant it. These petitioners seek only the opportunity to have their second amended complaint in the independent action answered, and the way cleared for a trial of this fraudulent conspiracy action on its merits—a chance to prove their allegations of fraud, to establish their equitable and legal claims. They feel that under law and equity the allegations of their dismissed complaint entitle them to this, which so far they have been denied.

III

The Circuit Court, in its decision and judgment of March 1, 1951, with respect to its Case No. 10,724, has not given proper effect to applicable decisions of this Court, such as the *Marshall* case, the *Hazel-Atlas* case, the *Klapprott* case, and many cases cited in the *Hadden* case, all supra; and has misapplied the *Throckmorton* case, and the *Josserand* case (which, as before stated, was decided before Rule 60(b) was amended).

IV

The United States Court of Appeals for the District of Columbia is now one of the circuit courts of the Federal system, and, therefore, should give great weight to the opinions and decisions of other Federal Circuit Courts (See *Sokol Bros. Furniture Co.* v. *C. I. R.* (CA-5 1950), 185 F. 2d 222). Hence, it is considered that the reasons for certiorari that may be considered by this Court set out in both Subsection (b) and (c) of Section 5 of this Court's Rule 38 now apply to this Circuit

Court. It appears, therefore, that, in addition to the ones above set out, other reasons warranting this Court's jurisdiction, are that *this Circuit Court has rendered a decision in conflict with other Circuit Courts on the same matters; has decided important questions of Federal law concerning Rules 24 and 60(b), FRCP, which have not, but should be, settled by this Court; and has decided a Federal question probably in conflict with applicable decisions of this Court.*

PRAYER FOR WRIT

WHEREFORE, for the above reasons, Petitioners pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals, District of Columbia Circuit, commanding that court to certify and send to this court, for its review and consideration, a full and complete transcript of all the proceedings in the causes entered on the Circuit Court's docket as No. 10,475, entitled *Mary Ellyson Dowdy et al.* v. *Clayton Hawfield Executor*, and No. 10,724, entitled *Mary Ellyson Dowdy et al.* v. *Clayton Hawfield et al.;* that the judgments therein of the United States Court of Appeals, District of Columbia Circuit, may be reviewed and reversed by this Honorable Court; and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

LUTHER ROBINSON MADDOX,
1032 Woodward Building,
Washington 5, D. C.,
Attorney for Petitioners.

MARIE FLYNN MADDOX,
Of Counsel.

NOTE:
Italics supplied.